

FAMILY AND SUCCESSION LAW



Wolters Kluwer

Malaysia

by

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&

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This monograph has been reviewed by the Authors and is up-to-date as of August 2018

2018



Wolters Kluwer

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: international-sales@wolterskluwer.com
Website: lrus.wolterskluwer.com

Sold and distributed in North, Central and South America by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:
Air Business Subscriptions
Rockwood House
Haywards Heath
West Sussex
RH16 3DH
United Kingdom
Email: international-customerservice@wolterskluwer.com

The monograph *Malaysia* is an integral part of *Family and Succession Law* in the *International Encyclopaedia of Laws* series.

Printed on acid-free paper.

ISBN 978-90-654-4888-0
Family and Succession Law was first published in 1997.

Kamaruddin, Zaleha; Ishan Jan, Mohammad Naqib; Halim, Akmal Hidayah; Mohd, Azizah & Ibrahim, Norlia. 'Malaysia'. In *International Encyclopaedia of Laws: Family and Succession Law*, edited by Walter Pintens. Alphen aan den Rijn, NL: Kluwer Law International, 2018.

This title is available on www.kluwerlawonline.com

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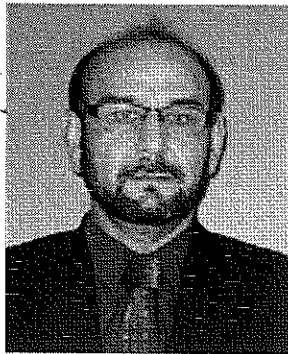
Printed in the United Kingdom.

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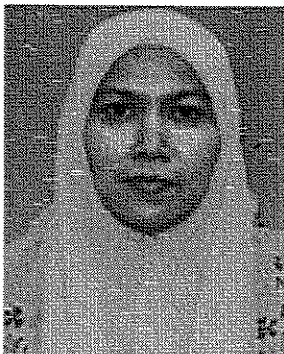
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Preface

Family law is one aspect of the laws that treat Malaysians differently according to their race, religion and custom. It is not the intention of the legislature to segregate them according to their creed. The present situation came about as a result of history and the development of Malaysian society.

Malaysia has always been under the influence of various religions and races. Prior to the English occupation, there was no uniform system of law, domestic or otherwise in Malaysia, although a Malay Legal Code had existed since the fifteenth century. Malay customary law, mixed with Hindu law and Muslim law, was also in existence but was mainly confined to the Malays. The Chinese and Indian customary laws were introduced with the large-scale immigration of Chinese and Indian labourers to assist in economic development of the then Malaya. Therefore, in many cases, judges had to take local customs into consideration.¹

Although Islam is, constitutionally, the official religion of Malaysia, other religions are permitted. Previously, each individual ethnic group was governed by a mixture of customary and civil law. Islamic law applied to Muslims, the Malay *Adat* to certain sections of the Malay people, Hindu law to those who profess the Hindu religion and Chinese law to the ethnic Chinese. However, the scope of these personal laws was confined to family law only.

Highlighting the need for legislative intervention in personal law, in the case of *Re Ding Do Ca deceased*, L.P. Thomson commented that:

The whole question of personal law in the country particularly as regards questions of marriage, divorce and succession, calls for the attention of the legislature. As regards persons professing Islam, the position is tolerably clear. But as regards persons of Chinese race, the law the courts are administering is probably different from any law, which exists or even existed in China. The same sort of position may well arise in relation to persons professing the Hindu religion by reason of the enactment in India of the Hindu Marriage Act 1955.

In all matters relating to the family, Muslims are governed by Muslim law.² Although the then Lord President stated that the position as regards persons professing Islam is tolerably clear, there were also defects in the administration of the

1. A. Ibrahim, *Family Law in Malaysia and Singapore*, 2nd ed. MLJ (Singapore: 1984).

2. See *Ramah v. Laton* (1927) 6 FMSLR 128, where the court held that Islamic law was the law of the land which the court must take judicial notice, and could not be considered as foreign law.

Preface

Islamic family law in Malaysia. As Islamic law falls within the purview of the State authorities, each State in Malaysia had its own law for the administration of the Islamic family law, as well as its own system of courts, and for this reason most parts of the law were administered at the State level in the State *Qadhi's* courts. The provisions in the various enactments were somewhat similar as they were all based on Islamic law. However, although the enactments followed the same pattern and had much in common, there were sometimes significant differences between them, and these gave rise to the diversity and complexity that became the hallmark of Muslim family law in Malaysia. Furthermore they contained numerous loopholes and weaknesses, which were taken advantage of in certain quarters.

The high divorce rate among Muslims in the country was particularly alarming, and this led to the demand by various organizations for a revision of the law, to consolidate and improve its provisions, thereby making them more or less uniform among the States. Against this background, the Federal Government made an attempt to draw up a model law for a uniform administration of Islamic family law. A draft was prepared which was approved in principle by the Conference of Rulers. It was sent to the various States for their comments and approval. In Kuala Lumpur, this resulted in the enactments of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) based on the advice of a committee set up to consider the legislation. Although the original intention was to have uniformity of the law among the various states, this has unfortunately not been possible until mid-2001 when the Council of Rulers approved six drafts of Islamic laws which include Islamic Family Law. This positive development towards uniformity bore fruit, with all states (except Kedah) adopting the model law (after some amendments) from 2002 onwards.

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June 2017*

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